



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Clyde G. Steagall, Inc. d/b/a Mid Valley  
Electric

**File:** B-237184; B-237187; B-237188; B-237189

**Date:** January 10, 1990

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### DIGEST

1. The Small Business Administration has the statutory authority to review a contracting officer's findings of nonresponsibility and to conclusively determine a small business concern's responsibility through the certificate of competency process.
2. Certificate of competency (COC) proceedings were properly conducted where protester was given sufficient notice that its contract performance history was under review and was given an adequate opportunity to, and did in fact, present information on its own behalf with regard to that performance history to the Small Business Administration, which then considered the information in its COC deliberations.
3. Agency was not obligated to furnish the protester with a copy of a pre-award survey report for use during a certificate of competency proceeding.
4. Where the record shows that the Small Business Administration (SBA) considered all information provided to it by the protester during the certificate of competency proceeding, protest that vital information was not considered by SBA is denied.

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### DECISION

Clyde G. Steagall, Inc. d/b/a Mid Valley Electric, protests the decision of the Small Business Administration (SBA) to deny it a certificate of competency (COC) in connection with invitation for bids (IFB) No. DACA05-89-B-0118, issued by the Army Corps of Engineers, and IFB Nos. F0466-89-B0057, F0466-89-B0061, and F0466-89-B0048 which were issued by the Department of the Air Force. Mid Valley contends that the Corps and the Air Force acted in bad faith in finding the

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firm nonresponsible and that they and the SBA acted in bad faith in connection with the COC process. We deny the protests.

#### THE AIR FORCE PROTEST

Each of three Air Force solicitations was for a project on Beale Air Force base: one was for the replacement of hospital generators, one was for the replacement of electromagnetic pulse doors, and one was for the replacement of power panels. Mid Valley was the apparent low bidder on each of these solicitations. The contracting officer requested a pre-award survey to determine whether Mid Valley was responsible to perform under these IFBs. After reviewing these surveys, which disclosed a record of Mid Valley's unsatisfactory performance under previous contracts with several government agencies, the contracting officer found Mid Valley nonresponsible under each of the IFBs. He then referred the matter to the SBA for consideration under SBA's COC procedures, citing as the basis of the nonresponsibility determination Mid Valley's unsatisfactory record of quality of work, effectiveness of management, timely performance and compliance with labor and safety standards.

The SBA advised Mid Valley that the Air Force's nonresponsibility determinations were based on the firm's "poor past performance, and poor effectiveness of management on several previous government contracts," and invited Mid Valley to file applications for COCs. The SBA cautioned the firm that it would have the burden of proving its responsibility. The protester submitted applications for the three solicitations. The SBA subsequently refused to issue the COCs.

Mid Valley contends that the Air Force had improperly prepared evaluation reports in connection with three prior contracts that the firm performed on McClellan Air Force Base, and that the use of these evaluations tainted the responsibility decisions at issue here. The protester also argues that because these reports were later available for other government agencies to review, their effect was a de facto debarment or suspension of Mid Valley.

The SBA, and not this Office, has the statutory authority to review a contracting officer's findings of nonresponsibility and to conclusively determine a small business concern's responsibility through the COC process. Oakland Corp., B-230717.2, July 27, 1988, 88-2 CPD ¶ 91. Our review is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in a denial of the protester's opportunity to seek SBA review, or

whether the SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing on the firm's responsibility. Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132. In this connection, since government officials are presumed to act in good faith, we require the protester to allege facts that reasonably indicate the government actions complained of were improperly motivated. See Action Building Sys., Inc., B-237067, Oct. 4, 1989, 89-2 CPD ¶ 311.

In this case, the alleged impropriety was that the evaluations were prepared 6 to 12 months after the contracts had been completed. The protester contends that pursuant to applicable regulation they had to be prepared when the contract ended and complains that one report was prepared by a different contracting officer than the one assigned to the contract.

The regulation to which the protester refers, Federal Acquisition Regulation (FAR) § 36.201(2) (FAC 84-45), in fact states that:

"The report shall be prepared at the time of final acceptance of work, at the time of contract termination, or at other times, as appropriate, in accordance with agency procedures. Ordinarily, the evaluation official who prepares the report should be the person responsible for monitoring contract performance." (Emphasis added.)

We do not agree with the protester's argument that the regulation always requires the agency to complete the evaluation at the time of contract completion, nor do we agree with the implied argument that any evaluation prepared later would be invalid or illegal. Similarly, we find no requirement in the regulation that the contracting officer involved in the contract always be the evaluator. Moreover, the protester has neither alleged nor shown that the late preparation, or the preparation by a different official, in any way affected the accuracy of the performance evaluation, or that it was inaccurate for any other reason.

In fact, the record discloses a pattern of unsatisfactory performance involving other contacts with other agencies besides the ones at issue here, and also discloses that the contracting officer's investigation was thorough. For example, the record includes reports of substandard workmanship on a construction contract, where incorrect wall studs were installed, so that frames would not fit; drywall was installed with cracks and chips, requiring the area to

be reworked; and a fan motor was ruined due to improper electrical wiring. Several performance evaluations also cited Mid Valley's failure to adhere to safety requirements; one noted that violations of safety practices were of sufficient magnitude to be life-threatening. In these circumstances, we find no impropriety in the agency's determination that Mid Valley was not a responsible prospective contractor.

Mid Valley also contends that the Air Force's negative performance evaluations, and other procuring agencies' reliance on these reports, will have the effect of a de facto debarment from further government procurements, and that Air Force officials indicated an intent to preclude Mid Valley from receiving any further Air Force contracts.

A negative evaluation may be seen as an indication of a contractor's nonresponsibility; however, that is entirely proper. In this regard, the FAR states that to be determined responsible, a prospective contractor must have a satisfactory performance record. FAR § 9.104-1 (FAC 84-39). Furthermore, a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken sufficient corrective action. FAR § 9.104-3(c) (FAC 84-39).

While Mid Valley's performance record may prevent it from receiving certain contracts, the firm is not precluded from taking corrective action and becoming responsible in the future. Future responsibility determinations will be based on the firm's capability at the time of the procurement. Accurate Indus., B-232962, Jan. 23, 1989, 89-1 CPD ¶ 56. In this connection, we find no evidence in the record, beyond Mid Valley's allegation, that the Air Force intends to automatically preclude awards to Mid Valley in future procurements.

#### THE CORPS PROTEST

The Corps solicitation was for a contract to increase the voltage of the electrical distribution system of Sacramento Army Depot. The project would require the contractor to replace every transformer on the depot and would necessitate depot-wide and individual-building power outages. As in the Air Force solicitations, Mid Valley was the low bidder under the Corps solicitation, and the contracting officer ordered

a pre-award survey. When the Corps received Mid Valley's performance history, it discovered that the firm had received an unsatisfactory performance evaluation on a previous Corps contract at Beale Air Force Base, which is also in the Sacramento District. Noting that the Corps had under that contract experienced extensive untimely performance problems with Mid Valley--for example, the contractor's personnel did not arrive on site until 1 week before the scheduled contract completion date--and that the firm had demonstrated an inability to effectively manage its projects, the Corps determined that Mid Valley was not a responsible contractor for the performance of this contract. The contracting officer took into consideration the fact that under this proposed contract, the contractor would be required to schedule numerous power outages, some of which would require a complete work stoppage throughout the base, and that Mid Valley's record was particularly poor in the areas of scheduling and management. The contracting officer's determination was further supported by the fact that four of seven recent performance ratings, that Mid Valley had received for military contracts, were unsatisfactory. The contracting officer referred the matter to the SBA, and the SBA again invited Mid Valley to apply for a COC, stating that the nonresponsibility finding was based on the firm's poor past performance. The SBA investigated the matter and again declined to issue a COC.

The protester contends that the Army's COC referral to the SBA was made in bad faith because it includes the statement, "this contractor has had one contract with the Sacramento District for work at Beale AFB, CA. They received an unsatisfactory Performance Rating for that contract." Mid Valley complains that no mention was made of a Corps contract that the firm completed satisfactorily at approximately the same time at McClellan Air Force Base, and that this omission constituted a false representation of the protester's recent procurement history and was evidence of the contracting officer's bad faith. We disagree.

In referrals of nonresponsibility determinations to the SBA, there is no requirement that a contracting agency submit information in its possession tending to show that a firm is responsible, since the burden is on the firm to prove through its COC application that the firm is responsible. Fastrax, Inc., B-232251.3, supra. In this case, the Corps contract to which the contracting officer referred was the one that he found most relevant to the issue of Mid Valley's responsibility under this proposed contract, in light of the extreme scheduling problems that arose during that previous performance and the very tight scheduling

demands anticipated under this contract. In our view, the Corps' determination that it could not rely on Mid Valley to improve its management and scheduling problems sufficiently to meet the very stringent demands of this contract, based on Mid Valley's performance record, was reasonable and did not indicate bad faith.

Mid Valley also alleges that the Corps acted in bad faith by refusing to provide Mid Valley copies of the performance appraisals that were considered in the nonresponsibility determination.

Contracting agencies are not required to release such information for use in COC proceedings. See Coast Canvas Products II Co., Inc.--Reconsideration, B-222800.2, May 5, 1986, 86-1 CPD ¶ 435. Here, we do not believe there is any question that Mid Valley knew what areas of concern were at issue and that the protester was not impeded in any way from responding to those concerns. The Army points out that Mid Valley had responded to these same concerns during the performance evaluation of the Beale Air Force Base contract a few weeks before the COC proceeding. Furthermore, the Corps based its determination on the pattern of behavior that was revealed by Mid Valley's performance history as a whole, rather than any particular event that needed to be identified. We therefore find no support for the protester's charge that it was precluded from effectively responding to the nonresponsibility determination.

#### THE SBA COC PROCEEDINGS

Mid Valley contends that the SBA acted in bad faith by willfully disregarding vital information prior to making its negative COC determinations. The protester bases this assertion on an alleged statement by an SBA official that SBA would not consider all of the material included with Mid Valley's application prior to making its COC determination because it was too voluminous. Mid Valley argues, in this regard, that the SBA did not conduct its own investigation but merely accepted the agencies' conclusions without fully considering the protester's version of events.

The SBA official responsible for reviewing the protester's COC applications has submitted a sworn affidavit stating that the protester contacted him several times shortly after the applications had been submitted, requesting a personal conference. The official advised Mid Valley that he had not yet reviewed all of the submitted materials and could not hold a meeting with the applicant without having done so.

However, he states that he did complete his reviews and considered all of Mid Valley submissions before presenting his conclusions to the COC committee.

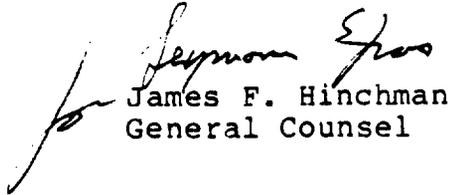
In our view, Mid Valley has not made the requisite showing of bad faith. SBA's record of its COC proceeding in this case supports its statement that it conducted its own independent investigation and fully considered the protester's submissions. The record indicates that the SBA contacted seven procuring activities regarding Mid Valley's past performance on government contracts. Six of those reported that Mid Valley had consistently failed to comply with contract quality and safety requirements, and failed to complete its contracts on schedule; it also failed to submit complete test reports and maintenance records. The record includes numerous specific examples of unsatisfactory performance, such as causing an electrical fire under one contract, which damaged a battery charging facility; dropping a transformer from a crane, smashing it through the wall of a building; allowing an unmonitored generator to unwind, destroying a transformer, and refusing to provide a replacement generator while the damaged one was being repaired. The record also includes Mid Valley's submissions, which do not, in our view, contradict the unsatisfactory performance evaluations or otherwise present information outweighing the evidence of poor performance in the record. Significantly, Mid Valley has not specified any particular information which would have been vital to its case, much less shown that it was submitted and willfully disregarded.

Mid Valley also insists, at length, that the SBA should have conducted an on-site visit or held a personal conference with Mid Valley. However, the protester itself points out that "all that is required of the SBA is that a COC applicant have an opportunity to present its own version of the facts." Fastrax, Inc., B-232251.3, supra. In our view, Mid Valley had ample opportunity to present its case, and apparently submitted hundreds of pages of information to the SBA. The record indicates that the SBA reviewed all of this information and also discussed the issues with Mid Valley by telephone. We therefore find no impropriety in the SBA's denial of a conference.

We find that Mid Valley has not shown that the Air Force or the Corps acted in bad faith in referring this nonresponsibility determination to the SBA, that the protester was in any way precluded from presenting information on its behalf

relating to the agencies' concerns, or that SBA failed to consider information vital to its responsibility.

Accordingly, the protests are denied.

A handwritten signature in cursive script, appearing to read "Seymour E. Hinchman", is written over the typed name. The signature is written in dark ink and is somewhat stylized.

James F. Hinchman  
General Counsel